# United States Circuit Court of Appeals

## For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

*Plaintiff in Error.*

vs.

SARAH J. IRVING,

*Defendant in Error,*

---

# PLAINTIFF IN ERROR'S REPLY BRIEF

---

*Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.*



---

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
*Attorneys for Appellant.*

INLAND PRINTING COMPANY, SPOKANE, WASH.

# United States Circuit Court of Appeals

## For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,

*Plaintiff in Error.*

vs.

SARAH J. IRVING,

*Defendant in Error,*

---

## PLAINTIFF IN ERROR'S REPLY BRIEF

---

*Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.*

---

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
*Attorneys for Appellant.*

Much space is occupied in the Brief of Defendant in Error in an attempt to constitute the bare *presumption* of negligence the equivalent of evidence, for the purpose of establishing an issue for the jury. The definitions quoted from the various opinions of Courts and text writers, with ever changing phraseology, refer to the presumption arising from the doctrine of *res ipso loquitur* as one of fact, one of law, and as a rule merely determinative of the burden of proof or of the duty to go forward with proof. Much confusion exists apparently in defining the nature of the presumption. In our humble judgment, it is not important whether it be called a presumption of fact or a presumption of law. In either event, it is properly "but a rule of law fixing the order of proof"; as said by Judge Chadwick in Nicholson v. Neary, 77 Wash.. 295, or "it is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof"; as Judge Sanborn said in Woodward vs. C., M. & St. P. Ry. Co., 145 Fed., 577; or as said by Mr. Hammon in his work on Presumptions (p. 47) as quoted on page 25 of our opening brief, presumptions, "In themselves, however, they are not evidence, although for the time being they accomplish the result of evidence. They are simply a process which aids and shortens inquiry and argument."

The rule applied to this case, requires the defendant to produce the facts. The facts do not permit of any inference consistent with the presumption of negligence. In other words, the evidence furnished

by the fact of the derailment is, upon the facts produced and which show the cause of the derailment, consistent with the presumption of due care, and not with any presumption of negligence.

"Finally, it is said that inasmuch as the presumption that the deceased was a passenger of the company, arose from the facts that the yard master was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the Court. But this argument loses sight of the fact that it is only when there is a dispute regarding material facts or a reasonable doubt as to the inference that must be drawn from the undisputed facts that the court is required to submit an issue to the jury. All the material facts in this case are proved without contradiction or dispute. The inference that must be drawn from them under the law is not doubtful. A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose."

*Chicago, St. P. M. & O. Ry. vs. Bryant,* 65 Fed., p. 969-975.

To contend that the rule is otherwise is to give to a mere presumption greater importance than is given to any class of evidence. It would be to create a thing of fiction, and then give to it double importance; because when added to the scale when the facts

upon which it is based are shown would be to give double weight to the same facts.

*Elliott on Evidence,* Vol. 1, Sec. 92.

A review of the authorities cited by Defendant in Error, would be of little assistance to the Court. Few, if any, of them are in point here, and the facts revealed by a full reading of the cases show in most if not all these cases, that the physical facts tended to prove negligence. For instance, in Brown v. La. & C. R. Co., 165 S. W., 1060, (Brief, p. 9), there was a broken rail, and inspection and standard equipment only were shown, while a flaw and fresh break were shown to exist; in Albion Lumber Co., v. De Nobra, 72 Fed., 739, (Brief, p. 3), the logging train was running at an excessive rate of speed; in the cases of Chaperon v. Portland General Electric Co., 67 Pac., 928, Abrams v. Seattle, 60 Wash., 356, and Sweeney v. Ewing, 228 U. S., 237, the agency causing injury is electricity, and evidence of proper inspection and due care is relied upon with no proof of an independent agency or control to account for the accident. Indeed this may be said of practically all the cases cited by Defendant in Error.

The attempt of counsel for Defendant in Error to infer negligence from the facts shown to exist goes far beyond the rules applicable to presumption and enters the realm of *supposition.*

On p. 33 of the Brief, under the head of "Review of the Evidence," attention is drawn to the fact that the Railway Company did not prove or attempt to

prove any motive for anyone going upon the right-of-way and wantonly causing the derailment of a train. It may be "scarcely conceivable" in counsel's mind that anyone would do such an atrocious thing, but, nevertheless, human experience is full of just such atrocious deeds on the part of persons of evil intent, and it is useless to argue that because no motive is shown that the fact should not be inferred from the physical conditions shown to have existed. There is no other inference which can reasonably be drawn from the facts shown by the evidence.

The attempt to make a jury question of the explanation of derailment offered by Plaintiff in Error is based wholly upon supposition, and not upon any inference from facts which the law of evidence permits.

"*Inference* as respects evidence, says the Alabama Court, is a very different matter from supposition. The former is a deduction from proven facts; while the latter requires no such premise for its jurisdiction. Courts and juries, in dealing with the inquiry, whether a party has discharged his burden of proof, cannot pronounce upon *mere supposition* that the burden has been met.

"Supposition has no legitimate sphere or habitation in judicial determination."

*Miller-Brent Lbr. Co. vs. Douglas,* 167 Ala., 286.

## PRESUMPTIONS DO NOT SUPPLY THE PLACE OF FACTS, BUT MUST GIVE WAY WHEN THE FACTS APPEAR.

"In general, presumptions can stand only whilst they are compatible with the conduct of those to

whom it may be sought to apply them, and must still more give place when in conflict with clear, distinct and convincing proof."

*Fresh vs. Gilson,* 16 Peters, 327.

"Presumptions, from evidence given in a cause, of the existence of particular facts, are in many, if not all, cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the Court is so far from being bound to instruct them that they are at liberty to presume it, that it would err in giving such instruction. For why give it when it is manifest that if the jury should find their verdict upon the fact so deduced, it would be the duty of the Court to set it aside and to direct a re-trial of the cause?"

*U. S. Bank vs. Corcoran,* 2 Peters, 121, 133.

"Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. *When these appear, presumptions disappear."* (Italics are ours).

*Lincoln vs. French,* 105 U. S., 614, 617.

"Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made."

*Galpin vs. Page,* 85 U. S., 351, 366.

"The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on *remote inferences.*

"A presumption which the jury is to make *is not a circumstance in proof; and it is not,* therefore, a legitimate foundation for a presumption." (Italics are ours).

*U. S. vs. Ross* (Civil), 92 U. S., 281, 284.

"The presumption of law that stockholders are deemed to be citizens of the state of the corporation's domicile must give way to the actual fact proved, that complainant is a citizen of a different state from the corporation."

*Doctor vs. Harrington,* 196 U. S., 579, 587.

See also:

*Fetter on Carriers of Passengers,* Vol. 2, Sec. 494,

where the true rule is stated.

Also:

*Norfolk Ry. Co. vs. Marshall,* 20 S. E., 823;
*Wabash R. Co. vs. Koenigsham,* 13 Ill. Appeal, 505;
*Sawyer vs. Railroad Co.,* 37 Mo., 241;
*Perry vs. Malarin,* 40 Pac., 489;
*Louisville Ry. Co. vs. Jones,* 9 N. E., 476;
*Pittsburg R. Co. vs. Williams,* 74 Ind., 462;
*Perishing vs. Ry. Co.,* 32 N. W., 488;
*Tuttle vs. Ry. Co.,* 48 Ia., 236;
*Eldridge vs. Ry. Co.,* 20 N. W., 151;
*Hazele vs. Ry. Co.,* 76 Ill., 501.
*Central Ry. Co. vs. Mote,* 48 S. E., 136;
*Canadian Ry. Co. vs. Senske,* 201 Fed., 637, (C. C. A.);
*Railway Co. vs. Hope,* 54 So., 369.

## CREDIBILITY OF WITNESSES.

The evidence of persons in the employ of the Railway Company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded. The employment or business of a witness affords no reason why this evidence should be arbitrarily or without reason disregarded.

*Brunswick R. Co. vs. Wiggins* (Ga.), 39 S. E., 551;
*Railroad Co. vs. Beason* (Ga.), 37 S. E., 863;
*Florida Central & P. R. Co. vs. Rudolph,* 38 S. E., 328;
*Railroad Co. vs. Wall* (Ga.), 7 S. E., 639.

In the case last cited the Supreme Court of Georgia lays down the rule, which has been consistently followed in that state, in the following language:

"The law, by raising a presumption of negligence and requiring the company to rebut that presumption by showing that all ordinary and reasonable diligence was observed, means to accept such explanation as, according to the manner of conducting business, it is possible to make. It is generally out of the power of the company to show this diligence, except by its employes. The law, therefore, certainly means to receive their evidence as the evidence of other witnesses is received, subject to be weighed, and, if there be anything against it, discredited, but to be credited and respected if there be nothing against it. There is no other way to carry out the scheme of the law, which is to require the railroad company to show the observance of all ordinary and reasonable diligence. To arbitrarily reject the explanation because it comes from employes is to cut off the company from defense altogether; it is to stand on the presumption, and treat it as impossible to make defense. That is not the scheme of the law. In this case the defense was complete, and we think the jury found contrary to evidence and contrary to law. There is no law that entitles a jury not to recognize due proof when it is made."

It was the duty of the Court to instruct the jury to return a verdict for the defendant at the close of the trial, because the evidence in explanation of the accident is undisputed, or, at least, is so clearly pre-

ponderant and of such a conclusive character that the Court would be bound, and was bound, in the exercise of a sound judicial discretion, to set aside the verdict in opposition to this evidence.

*Canadian N. R. Co. vs. Senske,* 201 Fed., 637. Opinion of Judge Sanborn on p. 644.
*Southern Pac. Co. vs. Poole,* 160 U. S., 438, 440;
*Union Pac. Ry. Co. vs. McDonald,* 152 U. S., 262, 283;
*Delaware & L. W. Ry. Co. vs. Converse,* 139 U. S., 469;
*Patillo vs. Allen West Com. Co.,* 131 Fed., 680; 686;
*Chicago Gt. W. Ry. Co. vs. Roddy,* 131 Fed., 712;
*Woodward vs. C., M. & St. P. Ry. Co.,* 145 Fed. 577.

While apparent conflict exists in decided cases as to the force of the presumption of negligence here under consideration, we think a careful reading of these cases will show that there is nothing really out of harmony with our contention here, but that in most, if not quite all the well considered cases, there was evidence in the nature of physical facts or testimony which support the presumption, and thus make a case for the jury. Where no such evidence exists nothing remains but for the Court to hold, as a matter of law, that defendant's evidence is controlling, and that there is no issue for the jury, or, if in case of doubt, the cause is submitted to the jury, and a verdict is found against the defendant, it is the duty of the Court to set aside the verdict, because it is not sup-

ported by a legal preponderance of the evidence. This Record, it appears to us, clearly presents a case where no issue of fact is involved, and it is the duty of the Court to dismiss the cause.

Respectfully submitted,

GEO. W. KORTE,
CULLEN, LEE & MATTHEWS,
*Attorneys for Appellant.*